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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re LUIS H. DELGADO,

on Habeas Corpus.

B215145

(Los Angeles County
Super. Ct. Nos. A967353, BH005589)

ORIGINAL PROCEEDING; petition for a writ of habeas corpus. Peter Espinoza, Judge. Petition granted.

Luis H. Delgado, in pro. per., and Rich Pfeiffer, under appointment by the Court of Appeal, for Petitioner.

Edmund G. Brown, Jr., Attorney General, Julie L. Garland, Assistant Attorney General, Jennifer A. Neill and Amanda Lloyd, Deputy Attorneys General, for Respondent State of California.

In 1988, Luis Delgado was sentenced to a term of 15 years to life for second degree murder, plus a two-year enhancement for personal use of a firearm. In February 2008, at his fifth parole suitability hearing, the Board of Parole Hearings (“Board”) found Delgado unsuitable for parole. Delgado filed a petition for writ of habeas corpus, contending that the Board violated his liberty interest in parole because no evidence supports the Board’s finding that he would pose an unreasonable risk of danger to public safety if released on parole. We agree and grant the petition.

BACKGROUND

A. Commitment Offense

In April 1988, Delgado, aged 21, attempted to enter a wedding reception uninvited, but he was stopped by the security guard, Enrico Bonner. Delgado threatened to kill Bonner, and he returned several hours later, riding in a car with several other people and carrying a rifle. Delgado was a passenger in the front seat of the car. Delgado held the rifle out the window and fired five shots, hitting Bonner every time and killing him. The car then drove away.¹

Delgado pleaded not guilty and was convicted by jury of second degree murder. He was sentenced as stated above.

B. Social History

Delgado was born in Mexico in 1967, the third of four children raised by his mother. His family moved to the United States when he was six months old. He has two older sisters and a younger half-brother. He reported that he has “a close supportive relationship with his family.” He got along well with others in school and was never

¹ According to Delgado, he had been invited to the party by the disc jockey, but the security guards would not let him in. The security guards called “additional security that escorted [him] outside and then ‘beat’ him.” Delgado left and went to a park, where he consumed alcohol with his friends. He remembered walking home from the park and had no memory of being in a car, having a gun, or shooting anyone.

suspended or expelled. As a youth, he kept busy by participating in various sports. Delgado left school in the twelfth grade to work in auto body and glass shops, but he obtained his GED in 1991, while in prison.

Delgado began using alcohol at age 15 and marijuana at age 20. He ignored his family's attempts to stop him from using alcohol and often drank "to get drunk" and experienced blackouts. He had no other medical or psychiatric problems.

Delgado had no history of juvenile offenses and one adult misdemeanor conviction for tampering with a motor vehicle.

C. Prison Record

Delgado was received at the Department of Corrections ("CDC") (now the Department of Corrections and Rehabilitation ("CDCR")) in September 1988. His classification score when he entered was 56, but it consistently dropped every year until it reached zero in 1999.² In 2002, his score was changed to 19, which is the mandatory minimum score for a life term inmate. (See CDCR, Department Operations Manual (January 1, 2009), Adult Classification, § 61010.11.5, p. 509.)

<http://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/DOM/DOM%20Ch%206-Printed%20Final.pdf> (as of September 23, 2009).) He had maintained his score of 19 for the 11 years prior to the parole hearing at issue. His custody level is Medium A,

² "Prisoner classification scores play a significant role in determining where, within the state's many prison facilities, a prisoner will be sent to serve [his] term of incarceration. [Citation.] As a general rule, a prisoner's classification score is directly proportional to the level of security needed to house the inmate. . . . ' . . . [¶] When a male inmate is first received in the prison system, he is housed at a reception center where his case factors are evaluated (i.e., length of sentence, criminal history, behavior during prior and current terms, including escape history) and a standardized system is used to compute a classification score to determine his initial placement in one of the state's prisons or camps. (See [Cal. Code Regs., tit. 15,] §§ 3375.1–3375.3, subd. (a).) The score is recalculated at least yearly and may determine the necessity of subsequent prison transfers. ([*Id.*,] § 3375.4.)" (*In re Player* (2007) 146 Cal.App.4th 813, 823–824.) Scores of 52 and above require the highest level of security (level IV). (Cal. Code Regs., tit. 15, §3375.1, subd. (a)(4).)

which is “the lowest security level for a life term prisoner.”³ (*In re Rico* (2009) 171 Cal.App.4th 659, 667.)

Delgado has received a total of three CDC 115 rule violations, in 1989, 1990, and 1992, all of which were for non-violent alcohol-related infractions.⁴ After Delgado began attending Alcoholics Anonymous (“AA”) and Narcotics Anonymous (“NA”) in 1992, he received no further CDC 115’s. Delgado also received four CDC 128-A Counseling Chronos for less serious infractions, the last one being given in 2007 for a covered window.⁵

Delgado has participated in a number of educational and self-help programs and received a number of positive chronos while in prison. He obtained his GED in 1991; he also received vocational certificates for welding and appliance repair and completed 12 units of college credits. In 2007, Delgado received a certificate of merit from the Valley Adult School and a positive chrono for improving his study skills. Delgado also received numerous positive chronos for his participation in AA, Prisoners with Children, Fathers Behind Bars, Alternatives to Violence, Keep Coming Back, and Healing for the Angry Heart. Delgado has been working in the prison kitchen since 2000.

D. Psychological Evaluations and Insight into Offense

A psychological evaluation was performed in October 2007 as an update to a July 2004 evaluation. The psychologist’s diagnostic impressions per the DSM-IV criteria

³ The CDCR “uses . . . inmate custody designations to establish where an inmate shall be housed and assigned, and the level of staff supervision required to ensure institutional security and public safety.” (Cal. Code Regs., tit. 15, § 3377.1, subd. (a).) At the Medium A custody level, inmates are housed in cells or dormitories within the facility security perimeter; their assignments and activities must be within the facility security perimeter; and their supervision must be “frequent and direct.” (*Id.*, subd. (a)(6)(A)–(C).)

⁴ A CDC 115 documents misconduct that is “believed to be a violation of law or is not minor in nature.” (Cal. Code Regs., tit. 15, § 3312, subd. (a)(3).)

⁵ A CDC 128-A documents incidents of minor misconduct. (See Cal. Code Regs., tit. 15, § 3312, subd. (a)(2); *In re Gray* (2007) 151 Cal.App.4th 379, 389.)

were Axis I: Alcohol Dependence, in a controlled environment remission; Axis II: Antisocial Personality Traits; Axis III: None known; Axis IV: Incarceration for life term.⁶ Delgado's GAF (Global Assessment of Functioning) score was 75 (on a 100-point scale). The psychologist stated that there was no evidence of mental illness, but that Delgado did have "a substance abuse disorder, specifically, alcohol use/abuse/dependence."

Discussing the life crime, Delgado reported that he had "no memory of being in a vehicle, of having a firearm, or of shooting anyone," and that his last memory was of walking home from the park. Delgado further "stated his belief that his life sentence was a fair one, and wished to emphasize to [the Board] how 'extremely sorry' he is and that he accepts full responsibility for the crime; he additionally emphasized that he does not wish to blame alcohol for the murder."

The psychologist believed that Delgado's "only risk factor as a precursor for problems would be if he should resume his use of alcohol/drugs." The psychologist further stated that her diagnostic assessment and conclusions remained unchanged from a prior report by a different psychologist, who concluded that Delgado's risk of future violent behavior was low. The 2007 conclusion was based on the following assessment guides: the Psychopathy Checklist, the History-Clinical-Risk Management-20, and the Label of Service Inventory/Case Management Inventory. Delgado scored in the low range on all of these tests.

⁶ The American Psychiatric Association publishes the Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1996) ("DSM-IV"), which sets forth all currently recognized mental health disorders and a comprehensive classification system. Generally, the classification system calls for information to be organized into five "axes" or dimensions to assist clinicians in planning treatment and assessing prognosis: (1) clinical disorders, (2) personality disorders, (3) general medical conditions, (4) psychosocial and environmental problems, and (5) global assessment of functioning ("GAF"). (*Id.* at p. 25.) Using a point scale from one hundred to one and organized into 10-point descriptive ranges, e.g., 80–71, 50–41, or 20–11, GAF scoring reflects higher overall functioning in the higher numbers. (*Id.* at pp. 30-32.)

In assessing the likelihood of future violence, the psychologist further cited Delgado's background "from a non-abusive, functional one-parent home," his disciplinary record in prison, and his numerous laudatory chronos. Because of Delgado's "notable life progress and improvements in education, vocational upgrades, self-help programming, and general maturation," Delgado presented a moderately low risk of future violence. Moreover, "[g]iven that the bulk of data contributing to this estimate is historical, then by definition, this score is not amenable to significant change regardless of the number of years of his incarceration."

The psychologist described Delgado as "mature and not impulsive as evidenced through self-help orientation and institutional programming" and as "emotionally and behaviorally stable." The report reiterated that, although Delgado "denied having memory of the controlling offense due to alcohol-induced amnesia," he "did not deny his responsibility for the crime" and "wishes to take full responsibility for what transpired." The psychologist pointed out that Delgado was fairly young at the time of the offense and speculated that Delgado might not have committed the offense had he not been intoxicated at the time. The psychologist thought that it would be helpful for Delgado to gain insight into the reasons that he overindulged in alcohol. The psychologist concluded that, "[i]f [Delgado] has any anger issues at all, which may have led to or exacerbated the life crime other than alcohol, it is likely related to being an underprivileged minority in a foreign country and growing up without a father figure, of which the inmate is well aware. [Delgado] does not presently exhibit anger-related problems and has not received any disciplinary infractions related to anger, aggression, or violence while in prison."

The July 2004 psychological evaluation was similar to the 2007 update. The DSM-IV diagnoses differed only on Axis II, which stated in 2004 that Delgado had "No Contributory Personality Disorder," instead of the "Antisocial Personality Traits" diagnosis of 2007. The other diagnoses were the same as in the 2007 update. In 2004, as in 2007, Delgado reported "being in an alcohol-induced blackout during the commission of his commitment offense." Delgado attributed the murder to a combination of alcohol

and anger, but he accepted responsibility for shooting the victim and stated that he was very sorry for having caused the victim's family and his own family such pain. The 2004 evaluation reported that Delgado had received no CDC 115 violations for violent offenses, and that he had suffered no alcohol-related disciplinary actions since beginning AA. The psychologist accordingly thought that Delgado would "pose a less than average risk for violence when compared to this level II inmate population," and that, if released, Delgado's "violence potential" was "estimated to be no higher than the average citizen in the community, should he maintain his sobriety." Delgado's "only risk factor as a precursor for problems" was alcohol or drug use, but Delgado acknowledged his alcohol problems. The psychologist accordingly recommended that Delgado continue participating in AA and NA and that he undergo random drug and alcohol testing.

At his 2008 parole hearing, Delgado stated that he had paid the victim restitution that was required and that he had wanted to contact the victim's family to express his regret for causing them such great harm, but that he was not allowed to do so. He also expressed regret for the harm he had caused to so many people, "especially the victim's family," and stated that he took full responsibility for what he had done.

E. Parole Plans

There is an immigration hold on Delgado, so he will be deported to Mexico if released. Delgado plans to move to Recovery House, which is a halfway house in Tijuana, Mexico, where he can continue to receive substance abuse treatment. Delgado's mother had visited the halfway house and secured a place for Delgado there once he is deported. Delgado's sister obtained a letter from a friend in Tijuana who offered a job to Delgado "installing and maintaining buried cable for telephone and data networks" and performing other computer hardware related tasks. The friend thought that Delgado's vocational course in appliance repair would provide a foundation for the work.

F. District Attorney's Position on Parole

The district attorney opposed Delgado's parole. The chief of police for the City of Los Angeles also opposed Delgado's parole, stating that Delgado was likely to continue his gang affiliation if released.

G. Board Decision

Delgado's February 2008 parole hearing was his fifth such hearing. The Board found that Delgado is unsuitable for parole and would pose an unreasonable risk of danger to society if released from prison. The Board reasoned that the crime was "done dispassionately and was obviously very calculated," relying on the fact that Delgado had several hours to plan the retaliation after having been excluded from the wedding. Although Delgado had been "a model prisoner," the Board expressed concern that the psychological evaluations showed "a lack of insight" because Delgado still largely attributed the offense to his intoxication. The Board thought that alcohol actually played only a small part in the offense because it was unlikely that Delgado could shoot Bonner five times without missing if Delgado were as intoxicated as he claimed he was. Although Delgado accepted responsibility for the crime, the Board reasoned that Delgado still failed to take responsibility for it because of his claim that he was in an alcohol-induced blackout at the time. The Board accordingly decided that Delgado needed an additional year of incarceration in order "to fully comprehend the triggers that led him to make the decisions he did that led to Mr. Bonner's death." The Board recommended that Delgado read some books to gain additional insight and write some paragraphs about any new insights for the parole hearing the following year. The Board further recommended that Delgado review the transcripts from his parole hearings.

H. Habeas Corpus Proceedings

Delgado filed a petition for writ of habeas corpus in October 2008 in Los Angeles County Superior Court. The Superior Court found that the record contained some evidence to support the Board's conclusion that Delgado continues to be an unreasonable risk of danger to society because he "continues to minimize the murder." The court

reasoned that the offense was especially heinous because there were other security guards at the scene who could have been injured by the shooting, the shooting was calculated and dispassionate, and the motive for the shooting was trivial. *~(Id. at pp. 1-2)~* The court further relied on the Board's skepticism that Delgado could have been drunk at the time of the offense because of his accuracy in shooting Bonner. *~(Id. at p. 2)~* The court denied the petition on January 7, 2009. *~(Ibid.)~*

Delgado filed a petition for writ of habeas corpus in this court on April 6, 2009. We issued an order to show cause, set a briefing schedule, and appointed counsel. The warden filed a return, and Delgado filed a traverse. The case is now ready for decision.

DISCUSSION

Delgado contends that the Board's decision is not supported by some evidence that he poses an unreasonable risk of danger to society if released on parole. We agree.

A. Governing Law

The purpose of parole is to help prisoners "reintegrate into society as constructive individuals as soon as they are able," without being confined for the full term of their sentence. (*Morrissey v. Brewer* (1972) 408 U.S. 471, 477.) Although a prisoner has no constitutional or inherent right to be conditionally released before the expiration of his sentence (*Greenholtz v. Inmates of Nebraska Penal and Correctional Complex* (1979) 442 U.S. 1, 7), in this state, Penal Code section 3041 creates in every inmate a cognizable liberty interest in parole, and that interest is protected by the procedural safeguards of the due process clause. (*In re Lawrence* (2008) 44 Cal.4th 1181, 1205 ["petitioner is entitled to a constitutionally adequate and meaningful review of a parole decision, because an inmate's due process right 'cannot exist in any practical sense without a remedy against

its abrogation,” quoting *In re Rosenkrantz* (2002) 29 Cal.4th 616, 664]; *Biggs v. Terhune* (9th Cir. 2003) 334 F.3d 910, 914–915.)⁷

Section 3041, subdivision (b), establishes a presumption that parole will be the rule, rather than the exception, providing that the Board “shall set a release date unless it determines that the gravity of the current convicted offense . . . is such that consideration of the public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed” Thus, section 3041 vests “California prisoners whose sentences provide for the possibility of parole with a constitutionally protected liberty interest in the receipt of a parole release date, a liberty interest that is protected by the procedural safeguards of the Due Process Clause.” (*Irons v. Carey* (9th Cir. 2007) 505 F.3d 846, 850.) “[I]n light of the constitutional liberty interest at stake, judicial review must be sufficiently robust to reveal and remedy any evident deprivation of constitutional rights.” (*In re Lawrence, supra*, 44 Cal.4th at p. 1211.)

When assessing whether a life prisoner will pose an unreasonable risk of danger to society if released from prison, the parole hearing panel considers all relevant, reliable information available on a case-by-case basis. The regulations set forth a nonexclusive list of circumstances tending to show suitability or unsuitability for release. (Cal. Code Regs., tit. 15, § 2402, subds. (c) & (d).) Factors tending to indicate suitability include: (1) absence of a juvenile record, (2) stable social history, (3) signs of remorse,

⁷ All references to section 3041 are to that section of the Penal Code. Section 3041, subdivision (a), provides as relevant: “One year prior to the inmate’s minimum eligible parole release date a panel of two or more commissioners or deputy commissioners shall again meet with the inmate and shall normally set a parole release date as provided in Section 3041.5. . . . The release date shall be set in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public, and that will comply with the sentencing rules that the Judicial Council may issue and any sentencing information relevant to the setting of parole release dates. The board shall establish criteria for the setting of parole release dates and in doing so shall consider the number of victims of the crime for which the inmate was sentenced and other factors in mitigation or aggravation of the crime.”

(4) significant life stress motivated the crime, (5) battered woman syndrome, (6) no significant history of violent crime, (7) inmate's age, (8) realistic plans for the future, and (9) institutional behavior. (*Id.*, § 2402, subd. (d).) Circumstances tending to show unsuitability include: (1) commitment offense was committed “in an especially heinous, atrocious or cruel manner,”⁸ (2) previous record of violence, (3) unstable social history, (4) sadistic sexual offenses, (5) psychological factors, and (6) serious misconduct while incarcerated. (*Id.*, § 2402, subd. (c).) “In sum, the Penal Code and corresponding regulations establish that the fundamental consideration in parole decisions is public safety.” (*In re Lawrence, supra*, 44 Cal.4th at p. 1205.)

The “core determination” thus “involves an assessment of an inmate’s *current* dangerousness.” (*In re Lawrence, supra*, 44 Cal.4th at p. 1205.) The Board is authorized “to identify and weigh only the factors relevant to predicting ‘whether the inmate will be able to live in society without committing additional antisocial acts.’” (*Id.* at pp. 1205–1206, quoting *In re Rosenkrantz, supra*, 29 Cal.4th at p. 655.) “[D]irecting the Board to consider the statutory factors relevant to suitability, many of which relate to postconviction conduct and rehabilitation, the Legislature explicitly recognized that the inmate’s threat to public safety could be minimized over time by changes in attitude, acceptance of responsibility, and a commitment to living within the strictures of the law.” (*Id.* at p. 1219.)

As a result, the “statutory and regulatory mandate to normally grant parole to life prisoners who have committed murder means that, particularly after these prisoners have

⁸ The regulation specifies the factors to be considered in determining whether the offense was committed in an especially heinous, atrocious or cruel manner as: “(A) Multiple victims were attacked, injured or killed in the same or separate incidents. [¶] (B) The offense was carried out in a dispassionate and calculated manner, such as an execution-style murder. [¶] (C) The victim was abused, defiled or mutilated during or after the offense. [¶] (D) The offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering. [¶] (E) The motive for the crime is inexplicable or very trivial in relation to the offense.” (Cal. Code Regs., tit. 15, § 2402, subd. (c)(1).)

served their suggested base terms, the underlying circumstances of the commitment offense alone rarely will provide a valid basis for denying parole when there is strong evidence of rehabilitation and no other evidence of current dangerousness.” (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1211.) The Board can, of course, rely on the aggravated circumstances of the commitment offense [among other factors] as a reason for finding an inmate unsuitable for parole; however, “the aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness to the public unless the record also establishes that something in the prisoner’s pre- or post-incarceration history, or . . . her current demeanor and mental state, indicates that the implications regarding the prisoner’s dangerousness that derive from . . . her commission of the commitment offense remain probative to the statutory determination of a continuing threat to public safety.” (*Id.* at p. 1214.)

B. Standard of Review

“[W]hen a court reviews a decision of the Board or the Governor, the relevant inquiry is whether some evidence supports the *decision* of the Board or the Governor that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings.” (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1212; see also *In re Shaputis* (2008) 44 Cal.4th 1241, 1254 [citing *Lawrence* for the “proper articulation of the standard of review”].) The standard is “unquestionably deferential” and “‘limited to ascertaining whether there is some evidence in the record that supports the [Board’s] decision.’” (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1210.) Nonetheless, the standard “certainly is not toothless, and ‘due consideration’ of the specified factors requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision—the determination of current dangerousness.” (*Ibid.*)

Our inquiry thus is “not merely whether an inmate’s crime was especially callous, or shockingly vicious or lethal, but whether the identified facts are *probative* to the central issue of *current* dangerousness when considered in light of the full record before

the Board.” (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1221.) The Board must articulate a “rational nexus” between the facts of the commitment offense and the inmate’s current threat to public safety. (*Id.* at pp. 1226–1227 [finding that no evidence supported the Governor’s determination that Lawrence remained a threat to public safety in view of her “extraordinary rehabilitative efforts specifically tailored to address the circumstances that led to her criminality, her insight into her past criminal behavior, her expressions of remorse, her realistic parole plans, the support of her family, and numerous institutional reports justifying parole, as well as the favorable discretionary decisions of the Board”]; *In re Ross* (2009) 170 Cal.App.4th 1490, 1497 [finding the Governor’s written decision to be flawed because it contained no explicit “‘articulation of a rational nexus between th[e] facts and current dangerousness’”].)

C. Analysis

The Board’s unsuitability determination was based on the heinous nature of Delgado’s commitment offense and the Board’s conclusion that Delgado was minimizing his responsibility for the offense by stating that he did not remember the offense because of his alcohol-induced blackout. The Board described the offense as calculated and dispassionate and “basically assassination,” because of the time that Delgado had to plan the crime after being ejected from the wedding. The Board commended Delgado for his progress in areas that were raised at his prior parole hearing, such as self-help, parole plans, residential plans, and employment plans, calling him “a model prisoner within CDC.” However, the Board also found not credible Delgado’s assertion that he was impaired by alcohol at the time of the shooting because of Delgado’s accuracy in hitting the victim with every shot. Because the Board members did not believe that alcohol played a major part in the offense, they concluded that Delgado was minimizing his responsibility for the offense and therefore needed at least an additional year of incarceration.

The heinous nature of the commitment offense and psychological factors are proper considerations in finding an inmate unsuitable for parole. (See Cal. Code Regs.,

tit. 15, § 2402, subd. (c).) “However, even if we assume (but not decide) that the circumstances of the killing support a finding that it was ‘especially heinous, atrocious or cruel’ ([Cal. Code Regs., tit. 15,] § 2402, subd. (c)(1)), ‘the aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness to the public unless the record also establishes that something in the prisoner’s pre- or post-incarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner’s dangerousness that derive from his or her commission of the commitment offense remain probative to the statutory determination of a continuing threat to public safety.’ [Citation.]” (*In re Palermo* (2009) 171 Cal.App.4th 1096, 1109.)

Nothing in Delgado’s pre- or post-incarceration history or his current demeanor and mental state support a prediction of *current* dangerousness. To the contrary, as the 2004 psychological evaluation and the 2007 update to that evaluation indicate, Delgado’s potential for future violence is either moderately low or “no higher than the average citizen in the community, should he maintain his sobriety.” Both evaluations point out that Delgado has had no anger or violence related disciplinary problems during his 20 years in prison, and both conclude that Delgado’s only risk factor is alcohol or drug use. As the 2007 evaluation points out, Delgado’s “ability to refrain from use/abuse when released is relatively good” because of his plans to move to the halfway house, “where substance abuse treatment will be provided upon parole.”

Although the Board disbelieved Delgado’s assertion that he was unable to recall the offense because of excessive indulgence in alcohol, the record contains evidence that Delgado had prior episodes of blackouts. In addition, Delgado has accepted “full responsibility” for the offense and emphasized that he did not wish to blame alcohol for his conduct. Penal Code section 5011, subdivision (b) provides that, in determining eligibility for parole, the Board “shall not require . . . an admission of guilt to any crime for which an inmate was committed . . .” (See *In re Palermo, supra*, 171 Cal.App.4th at p. 1111 [reversing the Board’s denial of parole where the court was “not persuaded” that

the Board's concerns about the inmate's insight into the offense "were not an indirect requirement he admit he is guilty"].)

The Board did not explain why Delgado remains a threat to public safety, 20 years after the offense, when the record indicates no other violent incidents in his life, and the psychological evaluations have found Delgado's risk of future violent behavior to be moderately low or low.⁹ Delgado had no juvenile offenses, one adult conviction for tampering with a vehicle, and no disciplinary actions for violent incidents in prison. He has not received any CDC 115's since beginning AA. Delgado has attempted to address the alcohol issues that contributed to the offense, he made restitution to the victim's family and has expressed remorse, and he has realistic parole plans, supported by his family. The Board thus failed to establish a "rational nexus" between the relevant factors and "the necessary basis for the ultimate decision – the determination of current dangerousness." (*In re Lawrence, supra*, 44 Cal.4th at p. 1210.)

"[U]nder the statute and the governing regulations, the circumstances of the commitment offense (or any of the other factors related to unsuitability) establish unsuitability if, and only if, those circumstances are probative to the determination that a prisoner remains a danger to the public. It is not the existence or nonexistence of suitability or unsuitability factors that forms the crux of the parole decision; the significant circumstance is how those factors interrelate to support a conclusion of current dangerousness to the public.' [Citation.]" (*In re Singler* (2008) 169 Cal.App.4th 1227, 1239.) Similar to *Palermo*, in which the court found that the nature of the offense and the inmate's "lack of insight into his behavior that led to the killing" were not sufficient evidence to support the denial of parole, those same factors cited by the Board here are not probative to the determination of whether Delgado remains a threat to the public. (*In re Palermo, supra*, 171 Cal.App.4th at pp. 1110-1112.) Rather, as in *Palermo*, Delgado

⁹ In addition, nothing in the record supports the police department's position that Delgado would "continue [his] gang affiliation" if released on parole. Delgado had no juvenile offenses, and there is no evidence of his alleged gang affiliation. Nor is there any evidence of gang or violence related infractions in prison.

has “effectively participated in rehabilitative programs; psychological evaluations opine he no longer represents a danger to public safety if released on parole; he has job skills and job offers if released; and he has a supportive family willing to ease his transition back into society.” (*Id.* at p. 1112.) We therefore conclude that there is no evidence in the record to support the Board’s finding that Delgado poses a danger to public safety if released on parole and that Delgado’s rights therefore were violated by the Board’s reliance upon the circumstances of his commitment offense and lack of insight in denying parole.

DISPOSITION

The petition for writ of habeas corpus is granted, and the Board’s decision is vacated. The Board is directed to find Delgado suitable for parole unless, within 30 days of the finality of this decision, the Board holds a parole suitability hearing and finds, based on new evidence, that Delgado currently poses an unreasonable risk of danger to society if released on parole

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.